

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COTY L. McCUALEY,

Case No. 2:14-CV-11198

Petitioner,

v.

CARMEN PALMER,

SENIOR UNITED STATES
DISTRICT JUDGE
ARTHUR J. TARNOW

Respondent.

MAGISTRATE JUDGE
PAUL J. KOMIVES

ORDER ADOPTING REPORT AND RECOMMENDATION [14],
DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING
PETITIONER'S CERTIFICATE OF APPEALABILITY

On September 9, 2014, the Magistrate Judge issued a Report and Recommendation (“R&R”) recommending that the Court deny Petitioner’s application for the writ of habeas corpus and deny certificate of appealability. On October 16, 2014, Petitioner filed an Objection to Magistrate’s R&R. For the reasons stated below, the Court adopts and reiterates the language of the R&R. Petitioner’s application for the writ of habeas corpus is **DENIED** and Petitioner’s certificate of appealability is **DENIED**.

FACTUAL BACKGROUND

The Court adopts the statement of facts set forth in the R&R as follows:

The charges against petitioner arose from two separate incidents, one in Howell and one in Brighton, during the late evening of January 13, 2010. The evidence adduced at trial was accurately summarized by the parties' briefs in the Michigan Court of Appeals. As summarized in the prosecutor's brief:

On January 13, 2010, Kenneth Goble was at the trailer he shared with Andrew Auxier. That evening, while Kashmere Bice was already there with Ken, Defendant showed up with Brooke MacDonald. Defendant and Kashmere were in a back bedroom, Ken walked back there to watch television and saw Defendant and Kashmere crouched in the corner of the bedroom having a serious conversation. When Ken walked in, Defendant "freak[ed] out," jumped up and angrily yelled at him to get out. Ken left the room, sat down, and about 15 to 20 seconds later, Defendant came down the hall, screaming and yelling. Using his fists, Defendant struck Ken repeatedly in the head and body. Ken reacted by curling up in a ball to protect himself. The beating ended only when Kashmere came out and literally sat on Ken's face to stop Defendant from beating him. Seeing that his face was swelling up, Ken went and locked himself in the bedroom.

While this was going on, Brandon Decare, who was at his nearby home, overheard a phone conversation that raised some concern, so he went to see Kashmere to see what was going on. When he arrived at the trailer, Brandon let himself in and saw Brooke MacDonald sitting at a computer in the living room. After he told Brook that he was there to pick up Kashmere, Brooke went to get and Brandon heard Defendant yelling at Kashmere. Brooke returned to the computer and said that she was afraid for her life. Brandon

then walked down the hallway to the bedroom and, as he did, he saw Ken Goble stick his head out of the bathroom and was amazing by the look of Ken's face. Brandom described that “[h]is eye was swelled like somebody hit him with a softball.” Ken went back into the bathroom and Brandon proceeded into the bedroom. He saw Kashmere crouched in the corner with Defendant crouched next to her. Sitting on a nightstand, Brandon saw a black-handled kitchen steak knife. As Defendant sprang up, he grabbed the knife, came towards Brandon, and yelled at him that “he wasn’t a person that I wanted to fuck around with [and] that this wasn’t the place that I wanted to fucking be.” While locked in the bathroom, Ken could hear Defendant screaming at Brandon and Brandon trying to calm him down. Brandon backed out down the hallway and as he did so, Defendant came towards Brandon, poked himself in the chest with the knife, and pointed the knife at Brandon within inches of Brandon’s chest. Finally, Defendant lunched at Brandon one more time and Brandon fell backwards and yelled at Defendant to get off him. Defendant got up and returned down the hallway to the back room. Brandon told Brooke, who was still seated at the computer, that he was leaving and calling the police. Although Defendant was a friend of his, Brandon said he called [the] police because he was afraid that Defendant would hurt someone else. After Brandon left, Ken heard Brooke tell Defendant that Brandon was leaving to call [the] police. Defendant and Kashmere then left the trailer.

Andrew Auxier, who lived in the trailer with Ken, testified that after the police left his Howell trailer, he and Brooke, along with Seth Brunner, went to Defendant’s house in Brighton. Seth Brunner testified that when they go to Defendant’s, Defendant told them to come in the house. Once in the house, Defendant closed the door and angrily told them to “have a fucking seat on the couch.” Seth, Brooke, Andrew, and Kashmere complied and all sat on the couch while Defendant yelled at them about how he wasn’t

“going back to the joint.” Seth said they were on the couch for a few hours and Defendant told them they weren’t leaving. Defendant told everyone to empty out their pockets and give him their cell phones. Seth and Defendant exchanged words and, although Seth said he didn’t see a “supposed gun,” when the thought to be a .22 caliber, he felt an object pressed to his neck and he was thinking whether or not Defendant was going to pull the trigger. Referring to the Howell incident, Defendant yelled about how unfair it was that Seth got to see his son and that it wasn’t fair that he wouldn’t see his daughter born. Seth described Kashmere as crying and being “mouthy” while Brooke was “hysterical.” At one point, Defendant told them that “if the cops come [they] were all leaving in a body bag.” Although Seth said he never saw a gun, he did see Defendant strike both Brooke and Kashmere. Specifically, he saw Defendant pull Kashmere by the hair a few times and put his hands over Brooke’s face and push her. Seth described the whole incident as lasting about three to four hours.

According to Seth, the ordeal ended when Defendant got emotional and started crying. He then let everyone go. Seth gave money to Brooke and Andrew to get food from Taco Bell, while he stayed with Kashmere and Defendant. At one point later, Kashmere’s cell phone, which was lying on the floor, rang. Defendant grabbed the phone from her and hung it up, demanding to know “who the fuck is you talking to.” After Seth received a text message, Kashmere’s phone rant yet again and Defendant reacted by throwing her cell phone downstairs and then picking her up with both hands and putting her back on the couch. Kashmere then started crying again. Seth then left later once Brooke came back to pick him up.

After watching a tape of his prior statement to police, Seth testified that he saw Defendant grab Brooke and hold a piece of glad to her throat. He also said that when he got to Defendant’s he saw Kashmere lying on the couch crying and

that he heard Kashmere say that Defendant had put a gun in her mouth before he arrived at Defendant's. Seth also finally admitted that [he] saw a black, metal .22 caliber gun with a brown handle in Defendant's hand.

According to Andrew, however, when the three of them got to Defendant's, they saw Defendant there with Kashmere and just hung out and watched television for a few hours. Andrew claimed that he and Brooke left the trailer around two or three in the morning and that nothing happened. Andrew testified that he never saw a gun and that Brooke, Kashmere, and Seth were "fine."

Kashmere testified that she had been romantically involved with Defendant and that he was the father of her unborn baby. On the night of January 13, 2010, she testified that she went to Ken and Andrew's trailer to hang out and party. Ken, Brooke, and Defendant were already there and the four of them hung out together, drank, and talked. Eventually, Defendant and Kashmere went together to the back bedroom to talk about an argument they had had about Defendant seeing another girl. Ken walked into the bedroom and Defendant told him to leave. She said ken got upset about it, threw a bag of potato chips at Defendant and walked out of the bedroom. Kashmere testified that Defendant followed him out a few minutes later and she saw Defendant hit Ken in the fact with his fists. To get Defendant to stop, she sat on Ken's face. Defendant stopped hitting Ken and, with Ken's face being all bloody, they apologized to each other. Kashmere and Defendant then went back into the bedroom when Brandon walked in and Defendant angrily told him to leave. But because Brandon wouldn't leave without Kashmere, she said Defendant got up and followed Brandon out of the bedroom. When she came out of the bedroom, she said Brandon was gone and that she heard Ken say that Brandon was going to call police. Once they heard that the police were coming, according to Kashmere, she, Brooke, and Defendant decided

to leave. Kashmere claimed she didn't see or hear anything about a knife or about Brandon being threatened with one.

Kashmere said that she and Defendant went to his house in Brighton. Later on, Brooke, Andy, and Seth showed up and, according to Kashmere, everyone was calm and sitting on the couch together. Although Defendant was angry and yelling bout getting [in] trouble for what happened with Brandon and Ken, Kashmere testified that she never saw a gun. According to Kashmere, eventually everyone left and she stayed and spent the night with Defendant.

Starting with the incident in Howell, Brooke MacDonald testified that she saw Defendant and Kashmere go into the back bedroom. After a little while, she saw Ken go back to the room as well. A few seconds later, she saw Defendant come out after Ken yelling at him. Brooke saw Defendant beat up Ken while Ken curled into a ball and started to cry. Brooke said she saw Kashmere come out and tell Defendant to stop hitting Ken and that Defendant and Kashmere then went back into the bedroom.

Brooke testified that a little while later, Brandon came over and asked where Kashmere was. She told Brandon that they were in the back bedroom and Brandon walked to the room. Moments later Brandon came backwards out of the room followed by a screaming Defendant. When they got to the end of the hallway, she saw Defendant grab a knife off a counter, push Brandon over and hold the knife to his throat. Defendant then poke himself in the chest with the knife. Brooke described that Defendant was "in a rampage."

Brooke said that Defendant then walked back to the bedroom. Brandon then left, saying he was going to call police. Afterwards, Brooke went back to the bedroom to see what was going on and saw that Kashmere was sitting in the corner crying. With Defendant yelling and Kashmere

crying, Defendant asked Brooke to take the three of them to Brighton where she dropped off Defendant and Kashmere.

Eventually, Brooke went back to Defendant's house with Seth and Andrew after she received a text from Kashmere asking her to come and pick her up. When they got there, Brooke called and texted Kashmere without a response. Finally, she knocked on the front door. Defendant answered the door and was very angry. She told Defendant she was there to pick up Kashmere and asked where she was. Defendant yelled at her repeatedly that she had to call the police. As Defendant continued to yell at her, Defendant asked who else was with her. She told Defendant that Seth and Andrew were. After she came inside alone, Defendant threw a large glass vase to the ground and broke it. He took a piece of the broken glass, held it to the side of her throat, and walked her outside. He pushed her down the step and yelled at Andrew and Seth that "they better come in the house or he was gonna kill [Brooke]." Once everyone got in the house, Defendant locked the door and instructed them to sit on the couch and no to move or he'd kill them. Kashmere came in the room, clearly having been crying, and sat down on the couch next to Brooke. Defendant then told everyone not to move and he started walking downstairs. Brooke heard Kashmere say that Defendant was going to get the gun and that it was underneath the snow outside the window. Defendant returned, holding a gun in his hand. He then held it in his hand. He then held it to Brooke's head, yelling that he was going to get in trouble for what happened in Howell. He also asked "why should you guys get to live your life if I can't live mine." At some point, Defendant also took Brooke's keys and all the cell phones. Defendant took the gun and held it to Andy's head, Seth's neck, and Kashmere's head, and did this to each of them more than once. Defendant was yelling all the time, including saying "why should you guys see your kids if I can't see mine" and that if the police came, they'd all be leaving in body bags. Kashmere cried as this was going on. Brooke estimated that

this lasted for probably three hours until Defendant finally sat down in a chair, took a clip out of the gun, threw the clip to the ground, put the gun in his lap, then said that they could leave, and started crying. Brooke grabbed her phone and keys and told Defendant “it was okay” and left.

While Defendant was in jail awaiting trial, he discussed with Kashmere the charges that he faced and the witnesses that would be required to testify to prove those charges. He also wrote a number of letters to Kashmere, which were admitted at trial. In those letters, as read by one of the officers, Defendant wrote:

“Oh yeah, I need you to talk to Ken for me. You and him could be witness for – you and him could be witnesses for the Brandon charge. If both say I never had a knife, then that’s one charge down, five to go.”

...
“I really hope they drop the charges for you, and Andy, and Seth. Well, the gun charge more than anything. I wish Andy would at least call my lawyer and to tell him that nothin’ happened. I really wish he would come test – I really wish he would come testify like you’re gonna.”

...
“Is gonna depend on the testimony of all the witnesses, but if Seth don’t talk, and you and Andry are saying it’s Brooke – that Brooke’s lyin’, I wonder if Andry and Seth don’t show up if they will drop the charges.”

...
“That’s what Brooke and Seth are gonna have to show – to show up and go on the stand against me. They’re gonna try to scare both them will charge – all them with charges. They can’t charge you because you never said or wrote that it happened. You know there’s gonna –

they're gonna go hard on you, Kash; don't let them break you. And Andy needs to help me."

...
“So, anything you can do will help. Andy needs to say nothin' happened to the paper. All he has to say is Brooke picked him and Seth up, they came over and chilled for a while, then Brooke took him back home.”

R&R [14] at 3–7.

LEGAL STANDARD

A. Standard of Review

The Court reviews objections to an R&R on a dispositive motion *de novo*. 28 U.S.C. § 636(b)(1)(C). *See also Lovell v. Duffey*, 629 F.3d 587, 593 (6th Cir. 2011). (“A district court’s legal conclusions in a habeas case are reviewed *de novo*.”). “A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.*

B. Analysis

Petitioner’s objections filed October 16, 2014, are reiterations of the points made in his original Habeas Corpus petition. Given that the Court has adopted the reasoning of the Magistrate’s R&R, after a *de novo* review, the Court rejects the Petitioner’s objections to the R&R. Those objections were adequately addressed in the R&R.

CONCLUSION

For the foregoing reasons, the Court adopts the Report and Recommendation [14], DENIES Petitioner's petition for habeas corpus, and denies Petitioner a certificate of appealability.

Therefore,

IT IS ORDERED that the Report and Recommendation [14] is **ADOPTED**.

IT IS FURTHER ORDERED that Petitioner's petition for habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that Petitioner is **DENIED** a certification of appealability.

IT IS FURTHER ORDERED that this matter is **IT IS ORDERED** that **CLOSED**.

SO ORDERED.

S/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: October 2, 2015

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on October 2, 2015, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Assistant